The EU Commission's "contempt" of national courts?

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On 11 September 2014, the European Court of Justice heard a case officially categorised as a competition law matter: Case C-170/13 *Huawei Technologies*. However, the issue before the Court is much more fundamental; it raises deep constitutional questions concerning the inter-relationship between the national courts and the European Commission – and in particular the asserted ability of the Commission to restrict certain classes of applicants from having access to national courts (and/or penalise their exercise of that right).

By way of background: The Landgericht Düsseldorf (in German only: here) essentially raises the question of whether it is an abuse of a dominant position for a standard-essential patent ("SEP") holder, who has made a commitment to license to any third party on fair, reasonable and non-discriminatory ("FRAND") terms, to seek an injunction before a national court against an alleged infringer who has declared (no more than) that he is willing to negotiate concerning such a license. Put more simply, the national court is asking what is the correct test to be applied by the national court in considering a request for an injunction in these circumstances.

Even if that were the only issue, the case raises an important question on the interplay between patent law and competition law, especially as Germany appears to be the only national patent jurisdiction that sees the application for an injunction by a SEP holder through the competition, rather than a patent law, lens.

Yet some very recent decisions of the Commission under Regulation 1/2003 have given this case a potentially deeper, constitutional, significance apparently not debated at the hearing before the CJEU. In its *Samsung* (here) and *Motorola* (here) decisions of 29 April 2014, the Commission asserted that the mere fact of an application to a national court for an injunction to prevent infringement of an SEP in circumstances comparable those in *Huawei* is capable of (and in *Motorola* was) an abuse of a dominant position. The effect of these decisions is that it is the Commission, and not the national court, who decided (independently of any findings by the national court and irrespective of whether that court has given judgment) that the very application for an injunction can be prohibited as an abuse of a dominant position. In paragraphs 309 and 310 of *Motorola* the Commission explained its reasoning in these stark terms:

> *The fact that an act by an autonomous judicial body (e.g the granting of an injunction by a court) is a precondition for the likely anti-competitive effects resulting from the conduct to materialise cannot affect the abusive nature of the conduct.*

Motorola was neither required to start or maintain the proceedings seeking the injunction, nor to enforce the injunction once it was granted. When exercising that discretion, Motorola had to ensure that the conduct it elected to pursue was consistent with its obligations under Article 102 TFEU."

As Sir Robin Jacob, former judge of the English Court of Appeal described the situation (here): "The Commission is in effect standing with a shotgun at the courthouse door and saying 'if you go in there and dare even ask for an injunction, we will shoot you.'"

In light of these developments it is difficult to see how the Court of Justice can decide the *Huawei* case without considering the role of the national courts within the EU and the importance of the fundamental right of any person (whether private or legal) of access to those courts, as enshrined in Article 6 ECHR (see e.g. *Golder* (here) and *Micallef* (here)) and Article 47 of the EU Charter (see e.g. Case C-279/09 *DEB* (here)); see also Directive 2004/48/EC *on the enforcement of intellectual property rights* (here).

In adopting this position, which one must assume will form part of that the Commission's submissions to the Court in *Huawei*, the Commission rejects basic fundamental rights principles rooted in national constitutional traditions. The Commission is not persuasive in its attempts to distinguish its decision in *Motorola* from the clear guidance given of the General Court (actually on the basis of the Commission's own submissions) in Cases T-

111/96 *ITT Promedia* (here) and T-119/09 *Protégé International* (in French only: here) that "[a]s access to the Court is a fundamental right and a general principle ensuring the rule of law, it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of a dominant position". The Commission's claims that *Samsung* and *Motorola* are exceptions are equally unpersuasive, as neither company behaved exceptionally; nor is standardisation or FRAND licensing exceptional, given that it is the norm in a large number of industries. However, the principle that a dominant company must militate its discretion to go to court, under threat of sanction is wholly new, as places a *de facto* competition law condition on access to a fundamental right.

As a result one can well see a high degree of legal uncertainty created by the Commission's approach and also a very real chilling effect on the exercise by any SEP holder of his right to seek a judicial remedy from a national court: a right that goes to the very heart of a Union governed by the rule of law. After all, the regulatory threat to the rights holder arises not only from the risk of the ultimate penalty an antitrust authority may impose for the mere fact of having applied to a national court but also, and more importantly, from the significant costs and uncertainty arising out of having to respond to a formal antitrust investigation by the Commission. The assertion in the *Motorola* decision that it does not prevent the undertaking from seeking or enforcing injunctions in relation to another SEP before the national courts is plainly disingenuous and renders any right of access to court no more than "theoretical and illusory" rather than "genuine and effective" (see e.g. *Stankov* (here)).

Rather than take action against the Member State whose court grants injunctions for SEP infringement (where it disagreed) the Commission's seeks to penalise the rights holder for the mere fact of seeking to exercise a right to apply to the national courts. It is this apparent disregard of the fundamental right which raises the more deep constitutional questions.

Of course, the fundamental right of access to court is not absolute. However, as with all exceptions to fundamental rights they (1) have to be construed restrictively, (2) must be "in accordance with the law" in the sense having a basis in law which is accessible, precise and foreseeable, (3) must not injure the very substance of the right of access to court; and (4) cannot depend on the executive's *ipse dixit* but (5) must ultimately be assessed by the court which is seized of the application itself (see *Tinnelly and McElduff* (here) and Case 222/84 *Johnston* (here)). However, the Commission's decisions do not satisfy any of these requirements.

This is also not the only recent example where the EU Commission has acted out its "contempt" for the national courts. In *Newby Foods* (here) the judge rejected the invitation to find the Commission in contempt of court but strongly criticised the Commission's response to an interim injunction granted by him. In doing so the judge noted that "as a corollary of the obligation that rests on national courts … the duty of sincere cooperation owed by Commission institutions must extend to according full and proper respect to orders made by the courts of Member States that are intended to secure or preserve individual rights under Community law. …, the exercise of that duty involves avoiding conduct that is deliberately directed at undermining an order of a national court made after due inquiry into the relevant facts. … It is not in my view proper for a Commission institution itself to declare that the decision of the national court is of no effect outside the jurisdiction of the Member State concerned, if that is done in a manner that implies that the court order can just be ignored. That is the function of the appropriate court (whether that is a national court or the Court of Justice will depend on circumstances)".

In a similar vein, referring to the principle of sincere co-operation enshrined in Article 4(3) TEU, Sir Robin Jacob (here) said recently that "The Commission is really saying, 'we do not trust the Member States' courts–they might grant an injunction which we think would be an abuse of monopoly. We, an administrative agency, know better.' So much for 'mutual respect'."

In *Huawei*, the referring court asked what test it should apply. The Commission's approach, however, goes much further and creates a *de facto* filter on what cases will in fact come before a national judge. The *Huawei* case provides an important first opportunity for the Court of Justice to address the confusion created and restore the correct balance between national courts and the European Commission.

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